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No. 87-436

In the Supreme Court of the United States

OCTOBER TERM, 1987

VINCENT C. LOMBARDI, ET AL., PETITIONERS

v.

DOW CHEMICAL COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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Petitioners are 287 Vietnam veterans who opted out of the class action in the Agent Orange multidistrict litigation and independently sued various manufacturers of the herbicide "Agent Orange." The United States was named as a third-party defendant in the action (Pet. App. 492a, 581a).[1] Petitioners challenge the court of appeals' conclusion that the military contractor defense bars their claims.

The district court granted summary judgment in favor of the manufacturers "on the alternative dispositive grounds that no opt-out plaintiff could prove that a particular ailment was caused by Agent Orange * * *, that no plaintiff could prove which defendant had manufactured the Agent Orange that allegedly caused his or her injury * * *, and that all the claims were barred by the military contractor defense" (Pet. App. 753a). The court of appeals did not address either of the first two grounds, but affirmed "on the military contractor defense" (*id.* at 754a).

[1] The petitioners in Nos. 87-436, 87-437, and 87-438 filed a single appendix.

The court of appeals added "a further reason for affirming the grant of summary judgment based on the military contractor defense," that "the weight of present scientific evidence does not establish that Agent Orange injured personnel in Vietnam," so that the manufacturers did not breach any "duty to inform the government of hazards" (*id.* at 754a-755a).

Petitioners primarily argue (Pet. 18-23) that the Court should refuse to recognize a military contractor defense. If it does recognize the defense, petitioners contend (Pet. 23-24) that the Court should adopt the version of the defense enunciated in *Shaw* v. *Grumman Aerospace Corp.*, 778 F.2d 736 (11th Cir. 1985), petition for cert. pending, No. 85-1529. The questions whether the defense should be recognized and, if so, what its contours are were both raised in No. 86-492, *Boyle* v. *United Technologies Corp.* (argued Oct. 13, 1987). It is plain that this case should be held for disposition in light of the Court's decision in *Boyle*.[2]

The petition for a writ of certiorari should be held pending the Court's decision in No. 86-492, *Boyle* v. *United Technologies Corp.* (argued Oct. 13, 1987), and then disposed of as appropriate.

Respectfully submitted.

DONALD B. AYER
*Acting Solicitor General**

DECEMBER 1987

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[2] Petitioners also contend (Pet. 25-29) that the court of appeals erred in affirming the grant of summary judgment without specifically discussing whether the defendants had met their burden of production and without, in petitioners' view, adequately examining the evidence in the record. That portion of the petition plainly raises no question warranting review by this Court.

* The Solicitor General is disqualified in this case.

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